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THE DEVELOPING ROLE OF THE MAGISTRATE IN THE FEDERAL COURTS

JACK B. STREEPY*

MANY PRACTICING ATTORNEYS ARE UNFAMILIAR with the role of the United States Magistrate in the federal judicial system. This article is intended to offer some insight into that role, both nationally and in the United States District Court for the Northern District of Ohio.

I. HISTORY

After several years of study, the Congress, in 1968, enacted the Federal Magistrates Act.¹ The Act abolished the part-time position of United States Commissioner and sought to "reform the first echelon of the Federal judiciary into an effective component of justice by establishing a system of United States magistrates."² In order to improve the former system, the Act made the position of magistrate analogous to the career service and replaced the fee system of compensation with substantial salaries. The Act also gave both full and part-time magistrates a definite term of office. Magistrates had taken over most of the former duties of the commissioners, and the Act gave them new authority in both civil and criminal jurisdiction. The Act grew from Congress' recognition that a multitude of new federal statutes and regulations had created an avalanche of additional work for the district courts which could be performed only by either multiplying the number of district court judges or giving judges additional assistance.

Full-time magistrates are appointed to a term of eight years by the judges of each district court. They are subject to removal for incompetency, misconduct, neglect of duty or physical or mental disability.³ The office may also be terminated if its services are no longer needed.⁴ The Act prohibits full-time magistrates from practicing law or engaging in any other business, occupation or employment inconsistent with the ex-

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In the course of this presentation, the experience of the author as a full-time magistrate for the Northern District of Ohio will be drawn upon to illustrate the evolution in the duties and responsibilities of the magistrate. That experience has ranged from conducting a twenty-one minute bench trial of an illegal parking charge to presiding over a twenty-one day non-jury patent trial, sitting as a master.

¹ 28 U.S.C. §§ 631-39 (1968) (amended 1979) [hereinafter referred to as Act]. Selected portions are set forth in Appendix A.

² S. REP. NO. 371, 90th Cong., 1st Sess. 8 (1967).

³ 28 U.S.C. § 631(i) (1979).

⁴ *Id.*

peditionous, proper and impartial performance of their duties as judicial officers.⁵ Magistrates are now subject to the Code of Ethics for Federal Judges adopted by the Judicial Conference of the United States.⁶

The first full-time magistrate in the Northern District of Ohio was appointed in 1971.⁷ Since that time three additional full-time magistrate positions have been authorized and filled. Thus, a total of four magistrates now serve the district.⁸

There has been significant growth in both the number of full-time magistrates in the United States and the duties referred to them. From a pilot program in a few districts, the number of full-time magistrate positions grew nationally from 61 in 1970, to 196 by 1979.⁹ During the same period of time, the number of part-time magistrate positions decreased from 449 to 271.¹⁰ In raw numbers the total number of matters considered by magistrates also grew nationally; in 1972 matters considered totaled 237,522; by 1979 that number had increased to 292,179. The increase in numbers does not tell the entire story. There has been a significant shift toward greater complexity in the matters considered by magistrates today, in comparison to those considered in 1972. For example, magistrates in a number of districts are conducting an increasing number of civil trials.¹¹ This growth is also reflected in the expanding jurisdiction of the United States Magistrate, illustrated by the fact that the Act has been amended a total of seven times—the most recent taking effect on October 10, 1979.

II. DUTIES AND RESPONSIBILITIES

The jurisdiction and powers of the United States Magistrate are set forth in the Act.¹² The criminal jurisdiction of magistrates is set forth in

⁵ *Id.* § 632(a).

⁶ *See* ADM. OFFICE OF THE FEDERAL COURTS, CODE OF JUDICIAL CONDUCT FOR FEDERAL JUDGES (1979).

⁷ The Honorable Herbert T. Maher was appointed to serve in the United States Courthouse, Cleveland, Ohio. He retired in 1979 upon the termination of his eight year appointment.

⁸ The four magistrates currently serving are the Honorable Jack B. Streepy, appointed in 1973, serving Cleveland, Ohio; the Honorable Charles R. Laurie, appointed in 1977, serving in Akron, Ohio; the Honorable David S. Perelman, appointed in 1979 to the position formerly held by Magistrate Maher, serving in Cleveland, Ohio; and the Honorable James G. Carr, appointed in 1979, serving in Toledo, Ohio. One part-time magistrate remains in the Northern District of Ohio, the Honorable James Michael Bernstein, serving in Lima, Ohio.

⁹ DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT, Table 71 (1979) [hereinafter cited as ANNUAL REPORT].

¹⁰ *Id.* Much of the decrease in part-time positions probably reflects consolidation of a number of part-time positions into a single full-time position. This has been part of the process in the Northern District of Ohio.

¹¹ *Id.*, Table 10.

¹² 28 U.S.C. § 636 (1979). *See* Appendix A.

greater detail elsewhere.¹³ In addition to numerous specific grants of jurisdiction, the Act empowers the district court to assign such additional duties to the magistrate not inconsistent with the Constitution and laws of the United States.¹⁴ While the most recent amendment of the Act has yet to be judicially interpreted, the United States Supreme Court has interpreted the statutory jurisdiction of the United States Magistrate under past amendments to the Act.¹⁵ This latest amendment is the most significant to date, granting full trial jurisdiction to the magistrate in all civil actions, with consent of the parties and reference by a judge. The amendment also grants the same jurisdiction as to all misdemeanors.

A. *Civil Jurisdiction*

It is in the area of civil responsibilities that the jurisdiction of the magistrate is undergoing the greatest evolution. Currently, the magistrates in the Northern District of Ohio conduct a wide range of civil duties.

1. Pretrial Conferences

The magistrates have conducted numerous civil pretrials. A judge may assign a pretrial on a separate basis, or as part of an omnibus order in a particular case where the judge gives the magistrate authority to conduct all necessary pretrial conferences, rule on all non-dispositive motions and enter a report and recommendation on all dispositive motions. Under the latter designation, magistrates have, in several instances involving a series of pretrial conferences and/or pretrial motions, obtained a settlement of the case prior to trial. In those cases which did not result in settlement, the judge did not expend time on various pretrial matters, rather it was only necessary for him to set the case for trial.

The pretrial authority of a magistrate is best described as it relates to the referral of additional duties by the judge in a specific case. Thus, in the discussion of these other duties, when relevant, reference shall be made to any pretrials which were held in conjunction therewith.

2. Non-dispositive Matters

A judge may designate a magistrate to hear and determine any pretrial matter pending before the court with the exception of certain specified motions which are potentially dispositive of the case, such as a

¹³ 18 U.S.C. §§ 3401-3402 (1976) (as amended 1979). See Appendix B.

¹⁴ 28 U.S.C. § 636(b)(3) (1979).

¹⁵ See *Mathews v. Weber*, 423 U.S. 261 (1976) (validated preliminary review function as within "additional duties" contemplated by Act); *Wingo v. Wedding*, 418 U.S. 461 (1974) (held 28 U.S.C. § 2243 (1976) (amended 1979) invalid so far as authorizing full-time magistrate to hold habeas corpus evidentiary hearings).

motion for summary judgment.¹⁶ In practice, the magistrates in the Northern District of Ohio have issued orders granting or denying, in whole or in part, numerous non-dispositive motions. These orders include rulings on motions to produce an expert's report in a trademark infringement case¹⁷ and various motions related to the pleadings in a patent case.¹⁸

3. Dispositive Matters

In addition to non-dispositive pretrial matters, a judge may designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to the judge proposed findings of fact and recommendations for disposition of any of the following categories: 1) motions for injunctive relief, 2) motions for judgment on the pleadings, 3) motions for summary judgment, 4) motions to dismiss or quash an indictment or information made by the defendant, 5) motions to suppress evidence in a criminal case, 6) motions to dismiss or to permit maintenance of a class action, 7) motions to dismiss for failure to state a claim upon which relief can be granted, 8) motions to involuntarily dismiss an action, 9) applications for post-trial relief made by a prisoner convicted (in either state or federal court) of a criminal offense and 10) petitions challenging conditions of confinement.¹⁹ These ten categories are referred to as "dispositive" matters since the decision on them may dispose of the case. Magistrates in the Northern District of Ohio have considered matters in each of these

¹⁶ 28 U.S.C. § 636(b)(1)(A) (1979). A judge may subsequently review any order of a magistrate on a non-dispositive matter where it is shown that the order is clearly erroneous or contrary to law. *Id.*

¹⁷ *Astatic Corp. v. American Electronics, Inc.*, 201 U.S.P.Q. (BNA) 411 (N.D. Ohio 1979).

¹⁸ *Skil Corp. v. Lucerne Prods., Inc.*, 489 F. Supp. 1129 (N.D. Ohio 1980).

¹⁹ 28 U.S.C. § 636(b)(1)(A)-(B) (1979). This section provides:

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

categories with the exception of motions to quash or dismiss indictments and petitions challenging conditions of confinement.

In most dispositive matters, an evidentiary hearing is unnecessary. The magistrate simply reviews the existing record and files a report and recommended decision. Copies are then sent to all parties, who have ten days to file written objections to any portion of the report. The judge makes a *de novo* determination of those portions of the report to which objection is made. The judge may accept, reject or modify, in whole or in part, the report of the magistrate. The judge may also receive further evidence or resubmit the matter to the magistrate with instructions.²⁰ In terms of quantity, the greatest number of dispositive matters referred to the magistrates in the Northern District of Ohio are social security reviews and petitions for a writ of habeas corpus.

While normally not required, numerous evidentiary hearings have been held on dispositive matters. Thus, in the aforementioned trademark infringement case²¹ the magistrate presided over a five day evidentiary hearing on plaintiff's motion for a preliminary injunction. Following the hearing a twenty-eight page report and recommended decision was filed setting forth proposed findings of fact and conclusions of law.²² The magistrate recommended that the motion be denied and the plaintiff filed objections. The judge considered the matter *de novo*.²³ Without conducting an additional evidentiary hearing, the judge denied the motion, and adopted the report and recommendation as his decision. A series of pretrials was subsequently conducted by the magistrate, resulting in settlement of the case.

Magistrates have also considered motions for temporary restraining orders in the Northern District of Ohio. The motions were settled in all but one case. The one motion not settled resulted in a two hour eviden-

²⁰ *Id.* § 636(b)(1)(c). This section provides: "(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties."

²¹ *Astatic Corp. v. American Electronics, Inc.*, 201 U.S.P.Q. (BNA) 411 (N.D. Ohio 1979); see note 17 *supra* and accompanying text.

²² *Id.*

²³ What constitutes proper *de novo* consideration by the judge following an evidentiary hearing before the magistrate is a matter of some controversy. See e.g., *United States v. Raddatz*, 100 S. Ct. 2406 (1980); *United States v. Lieberman*, 608 F.2d 889 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 673 (1980); *Campbell v. United States District Court for the Northern District of California*, 501 F.2d 196 (9th Cir. 1973), *cert. denied*, 419 U.S. 879 (1974). The Supreme Court in *Raddatz*, held the district court judge could constitutionally adopt the magistrate's recommendation to deny a motion to suppress, without conducting further evidentiary hearings; however, whether this ruling can be automatically applied to other dispositive matters requiring an evidentiary hearing is doubtful, particularly in view of the three variable factors *Raddatz* considered with reference to a motion to suppress in determining whether "the flexible concepts of due process have been satisfied." *United States v. Raddatz*, 100 S.Ct. at 2413.

tiary hearing before the magistrate, followed by a report and recommended decision which was adopted by the judge without an additional evidentiary hearing.²⁴

4. Special Master

A judge may also designate a magistrate to serve as a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure.²⁵ As a practical matter, this initially did not significantly increase the jurisdiction of the magistrate since Rule 53(b) sets forth rather severe restrictions upon the type of matter that can be referred to a master.²⁶ However, in 1979 the Act was amended to permit a judge to designate a magistrate to serve as a master in any civil case, without regard to the restrictions of Rule 53(b), but only if the designation is with the consent of all the parties in the case.²⁷

Since the 1979 amendment, numerous civil cases have been referred, with the consent of the parties, to magistrates (as masters) throughout the United States for trial of *all* issues. In the Northern District of Ohio, the most significant referral thus far has been the aforementioned patent case.²⁸ A short review of the various proceedings, pretrial and trial, conducted in that case by the magistrate provides a good summary of

²⁴ *Sitt v. Manor Care of Willoghby, Inc.*, No. C78-630 (N.D. Ohio June 7, 1978).

²⁵ See FED. R. CIV. P. 53. See also 28 U.S.C. § 636(b)(2) (1976) (amended 1979). This section provides:

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

....

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; . . .

²⁶ See *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

²⁷ See 28 U.S.C. § 636(b)(2) (1979). The 1979 amendment provides in part: (2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title [28 USCS §§ 1 et seq.] and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

Compare note 25 *supra*.

²⁸ *Skil Corp. v. Lucerne Prods., Inc.*, 489 F. Supp. 1129 (N.D. Ohio 1980). There had been extensive proceedings in the case prior to the parties' consent to a magistrate; including three appeals, twice to the Seventh Circuit and once to the Sixth Circuit, on issues of jurisdiction and venue.

the range of duties that may be assigned to a magistrate in a civil action. The magistrate entered a total of twenty-nine orders in the case, both pretrial and trial, many pertaining to non-dispositive motions primarily related to issues on the pleadings. Two pretrials were conducted by the magistrate. Prior to trial the magistrate filed one report and recommended decision (plaintiff filed a motion for partial summary judgment, which was denied). The non-jury trial before the magistrate required twenty-one days; the parties introduced in excess of four hundred exhibits. Following post-trial memoranda, the magistrate filed a seventy-three page report and recommended decision setting forth recommended findings of fact and conclusions of law. Following a review of the record, but without taking additional evidence, the judge adopted the report and recommendation.²⁹

In most cases heard by the magistrate sitting as a master pursuant to the consent of the parties, the judge does not make a *de novo* determination of the fact findings. If tried without a jury, the judge shall accept the magistrate's findings of fact unless they are clearly erroneous. However, the judge may also receive further evidence or recommit the matter to the magistrate with instructions.³⁰

Prior to the 1979 amendment, magistrates in a few districts regularly presided over jury trials. The magistrate's report and recommendation to the judge essentially recommended that the court enter an order consistent with the jury verdict. Magistrates in the Northern District of Ohio have not yet presided over a jury trial although a judge, with the consent of the parties, has referred at least two cases. However, both of these actions were settled prior to trial.

5. Other Matters

From time to time magistrates have been assigned other civil matters which do not fit precisely into one of the aforementioned ten categories. The magistrate in the Northern District of Ohio has: 1) presided over the oath of citizenship given to new United States citizens; 2) conducted evidentiary hearings with reference to Internal Revenue Service petitions to enforce tax summonses; 3) conducted an evidentiary hearing on a petition of the National Labor Relations Board seeking an adjudication that respondents were in civil contempt of an order to the Sixth Circuit Court of Appeals; 4) considered a motion to find the defendant in civil

²⁹ *Id.* There were two patents in the action. In addition to considering the issues of patent validity and infringement, the report addressed many other issues including priority of invention, fraud on the patent office, patent misuse, cancellation of a license agreement, waiver of a right to cancel a license agreement and damages. Although plaintiff was awarded \$294,079, the plaintiff had sought relief in excess of \$1,000,000. Accordingly, objections to the report were filed by both the plaintiff and the defense.

³⁰ FED. R. CIV. P. 53(e)(2).

contempt of a district court order; 5) conducted an evidentiary hearing on the issue of appropriate attorney fees for plaintiff's counsel in a successful civil rights action; and 6) conducted an evidentiary hearing on the issue of whether an attorney who was disbarred in state court should also be disbarred in federal court. Magistrates in other circuits have considered applications for administrative search warrants relating to tax liens³¹ and occupational safety.³²

6. Trial Jurisdiction

In relation to dispositive motions and serving as a master, the judge reviews the magistrate's report and recommendation and enters the appropriate order. The October, 1979 amendment of the Act eliminates this review responsibility of the judge. Now, upon consent of the parties, the magistrate (if specifically designated to exercise such jurisdiction by the district court) may conduct all proceedings in any civil action, jury or non-jury, and order the entry of judgment in the case.³³ The United States District Court for the Northern District of Ohio has specially designated that all the magistrates serving that court may try civil jury and non-jury cases and has passed the necessary local rules to effectuate this grant of jurisdiction.³⁴

In an action in which the parties consent to the magistrate's exercising trial jurisdiction, the parties also have a choice of appeal routes from the subsequent judgment of the magistrate. Upon the entry of judgment, the aggrieved party may either appeal directly to the appropriate federal court of appeals or, if they agreed prior to trial, the aggrieved party may appeal to the district court judge. Whatever the appeal route chosen by the parties, any appeal shall be taken in the same manner as an appeal from a judgment of a district court judge.³⁵

To implement the amendment of the Act in the Northern District of Ohio, the Local Rules³⁶ establish the following procedure. At the time a complaint in a civil action is filed, the clerk of courts provides counsel for the plaintiff with a notice informing the parties of their right to consent to the exercise of jurisdiction by a magistrate.³⁷ It is the duty of plaintiff's counsel to have this notice served upon all defendants along with service of the complaint.³⁸ Once defendants have been served, all

³¹G. M. Leasing Corp. v. United States, 429 U.S. 338 (1977).

³² Marshall v. Barlow's, Inc., 436 U.S. 307 (1977).

³³ 28 U.S.C. § 636(c)(1) (1979).

³⁴ N.D. OHIO CIV. R. 19.06(1)-(9). Following its review and consideration of the Act, the court made the special designation of jurisdiction and amended Chapter 19 of the Local Rules, which was effective January 8, 1980.

³⁵ 28 U.S.C. § 636(c)(3), (4) (1979). See Appendix A.

³⁶ N.D. OHIO CIV. R. 19.06(1)-(9).

³⁷ *Id.* R. 19.06(2).

³⁸ *Id.*

parties have ten days within which to respond as to whether they consent to have the magistrate exercise jurisdiction (with a few exceptions not pertinent herein).³⁹ Upon receipt of each party's affidavit consenting to the magistrate's exercise of jurisdiction, the judge to whom the case has been assigned is so informed.⁴⁰ If the judge signs an order of reference, the case is assigned to a magistrate for further proceedings.⁴¹ If the judge does not sign an order of reference, the case remains with the judge.⁴² Assignment in the Western Division of the Northern District of Ohio is to the single full-time magistrate sitting in Toledo, Ohio.⁴³ Assignment in the Eastern Division is by random drawing between the three full-time magistrates serving that division.⁴⁴ Since the January implementation of the Act, there have been, as of October 3, 1980, ninety-one consents to the magistrate exercising full jurisdiction. Included among them are cases including appellate review of the record, cases requesting non-jury trial and cases requesting jury trial.

As a practical matter, the most recent amendment of the Act codifies the practice that had existed in a few district courts under the former Act.⁴⁵ Such practice was apparently justified pursuant to the provision in the Act which permitted assignment to a magistrate of such additional duties as were not inconsistent with the Constitution and laws of the United States.⁴⁶

B. CRIMINAL JURISDICTION

Preliminary proceedings in criminal cases previously handled by commissioners are now handled by the magistrates.⁴⁷ Thus, the magistrate considers applications for search warrants and arrest warrants and issues these if supported by probable cause. When a defendant is arrested on a complaint and warrant, he is brought before the magistrate for an initial appearance, at which time he is informed of the charge against him and of his constitutional rights. If the defendant cannot afford counsel, an attorney is appointed to represent him. Bond is set and a preliminary hearing is scheduled. The hearing is to be held within ten days if the defendant is unable to make bond and within twenty days if he is released on bond.⁴⁸

³⁹ *Id.* R. 19.06(4).

⁴⁰ *Id.* R. 19.06(6).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* R. 19.06(7).

⁴⁴ *Id.*

⁴⁵ 28 U.S.C. § 636(c) (1979).

⁴⁶ *Id.* § 636(b)(3).

⁴⁷ *Id.* § 636(a)(1).

⁴⁸ FED. R. CRIM. P. 5.

The preliminary hearing results either in dismissing the complaint or binding the case over to the grand jury, depending upon whether the United States met its burden of showing probable cause to believe that a crime has been committed and that it was the defendant who committed it. A finding of probable cause may be based upon hearsay evidence, in whole or in part.⁴⁹ The magistrate also conducts removal proceedings in cases where the defendant has been arrested on a warrant from another district court. The rules concerning first appearances and preliminary hearings are applicable to removal proceedings.⁵⁰

In the Northern District of Ohio the magistrates also receive grand jury returns, conduct arraignments and conduct pretrials. The magistrate has also conducted one evidentiary hearing on a motion to suppress, subject to the aforementioned limitations.⁵¹

In the area of criminal trial jurisdiction, the 1979 amendment makes a major change. Prior to 1979, the magistrate could try minor offenses,⁵² but only if the defendant waived his rights to a jury trial and trial before a district court judge. Few minor offenses were prosecuted, thus few were tried by the magistrate. Those defendants who waived trial usually pled guilty. The only trials of minor offenses conducted by this magistrate have been petty offenses.⁵³

The 1979 amendment's change is two-fold: 1) the magistrate now has jurisdiction to try all misdemeanors,⁵⁴ thus adding to his jurisdiction those offenses carrying a maximum penalty of one year imprisonment with a fine in excess of \$1,000;⁵⁵ and 2) the defendant no longer must

⁴⁹ *Id.* R. 5.1.

⁵⁰ *Id.* R. 40.

⁵¹ See notes 19-20 *supra* and accompanying text.

⁵² 18 U.S.C. § 3401(f) (1976) (amended 1979). A minor offense refers to any misdemeanor, with a few exceptions not pertinent herein, the penalty for which does not exceed imprisonment for a period of one year, a fine of not more than \$1,000, or both. *Id.*

⁵³ A petty offense is defined as any offense for which the punishment does not exceed imprisonment for a period of six months, a fine of not more than \$500, or both. 18 U.S.C. § 1 (1976). It is in this context that the magistrate has tried a handful of petty offenses, including a twenty-one minute illegal parking trial. It involved the issue of whether the United States had proven guilt beyond a reasonable doubt when the government proved the defendant owned the car which was found to be illegally parked, but did not provide any direct evidence that the defendant was ever in his car on the date in question. There is a split of authority whether the finder of fact can make the necessary inference to find guilt in the absence of a statutory presumption. See, e.g., *State v. Scoggin*, 236 N.C. 19, 72 S.E.2d 54 (1952); *State v. Morgan*, 71 R.I. 101, 48 A.2d 248 (1946); *People v. Rubin*, 284 N.Y. 392, 31 N.E.2d 501 (1940).

⁵⁴ 18 U.S.C. § 3401(a) (1979). The 1979 amendment comprises new subsections (a), (b), (f), (g) and (h) of section 3401. They are set forth in full in Appendix B.

⁵⁵ 18 U.S.C. § 1 (1976). By way of example, a defendant charged with violating the Internal Revenue Code of 1954, 26 U.S.C. § 7215 (1976), consented to the magistrate exercising jurisdiction. The maximum penalty for this offense is one

waive his right to a jury trial since the magistrate now may conduct any misdemeanor trial, jury or non-jury. The District Court for the Northern District of Ohio has promulgated local rules, effective January 8, 1980, granting the magistrate full authority to try misdemeanors as set forth in the amendment of the Act.⁵⁶

The 1979 amendment permits the magistrate, when specially designated to exercise such jurisdiction by the district court, to try persons accused, and sentence persons convicted, of misdemeanors committed in the district. Accordingly, any person charged with a misdemeanor will be arraigned by a magistrate who will carefully explain to the defendant that he has the right to trial, judgment and sentencing by a district court judge or a magistrate and further, he also has the right to trial by jury before either. If the defendant files a written consent to be tried before a magistrate which specifically waives trial, judgment and sentencing by a judge, then the magistrate shall proceed to try the case. Once the defendant elects to be tried before the magistrate, the case proceeds to trial in the normal manner. Upon a judgment of conviction, the defendant has a right of appeal to a judge of the district court.⁵⁷

III. CONSTITUTIONAL IMPLICATIONS

The 1979 amendment of the Act granting full case jurisdiction to the magistrate has not been tested in court. Article III of the United States Constitution provides in part that, "The judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."⁵⁸ The same article directs that the judges of these courts shall "hold their Office during good Behaviour" and that their compensation "shall not be diminished during their Continuance in Office."⁵⁹ The magistrate is not an article III judge. His term of office is eight years and his salary is protected from being diminished only by statute,⁶⁰ not by the Constitution.

The constitutional question may be posed whether the magistrate, who is not an article III judge, is permitted to exercise trial jurisdiction

year imprisonment, a \$5,000 fine, or both. Due to the \$5,000 fine this misdemeanor could not have been tried by the magistrate prior to the 1979 amendment by reason of the \$1,000 restriction.

⁵⁶ N.D. OHIO CIV. R. 19.02.

⁵⁷ The district court may under certain circumstances order that a misdemeanor trial be conducted before a judge rather than a magistrate, despite the contrary election of the defendant. 18 U.S.C. § 3401(f) (1979). The right of appeal from the magistrate to a district court judge is set forth in 18 U.S.C. § 3402 (1976).

⁵⁸ U.S. CONST. art. III, § 1.

⁵⁹ *Id.*

⁶⁰ 28 U.S.C. §§ 631(e), 634(b) (1979).

under the circumstances called for in the 1979 amendment of the Act. The United States Supreme Court has not yet considered the constitutional implications of the magistrate's jurisdiction, either as it existed prior to the 1979 amendment or thereafter. Congress obviously concluded that its statutory grant of jurisdiction to the magistrate is constitutional. Such a conclusion is supported at least in part by circuit court decisions prior to the 1979 amendment which rules that reference of a civil trial to a magistrate sitting as a master passed constitutional scrutiny so long as the reference was with the consent of the parties.⁶¹

IV. THE FUTURE

The 1979 amendment was the most far-reaching of the many amendments to the Act. The immediate future will see a period of consolidation and adjustment to the expanded jurisdiction of the magistrate brought about by the amendment. However, it is doubtful whether this represents the final stage of evolution in the role of the magistrate. There remain some unanswered questions. As noted above, precise constitutional limits on the magistrate's jurisdiction will remain in question until the Supreme Court rules in an appropriate case. In addition, the present system has created a lack of uniformity among the district courts in their respective utilization of the magistrates.⁶²

The 1979 amendment was a compromise between differing versions of the appropriate scope of jurisdiction passed by the House of Representatives and the Senate.⁶³ From this it is evident that this is a controversial area and that Congress is continuing to monitor the role of the magistrate as carefully as when it considered that role prior to creation of the position and prior to passage of the many amendments thereafter. While further changes in the position cannot be positively predicted, it is relatively safe to state that despite the many changes in the past, the position of magistrate faces further changes in the future.

⁶¹ See, e.g., *Sick v. City of Buffalo*, 574 F.2d 689 (2d Cir. 1978); *Reciprocal Exchange v. Noland*, 542 F.2d 462 (8th Cir. 1976); *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). See generally, Silberman, *Masters and Magistrates Part II: The American Analogue*, 56 N.Y.U. L. REV. 1297 (1975) [hereinafter cited as Silberman].

⁶² For further discussion of this problem see Silberman, *supra* n.61.

⁶³ See H.R. Rep. No. 1046, 96th Cong., 1st Sess. (1979); S. Rep. No. 237, 96th Cong., 1st Sess. (1979).

APPENDIX A

28 U.S.C. § 636(c) (1979).

(c) Notwithstanding any provision of law to the contrary—

- (1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district courts, and when there is no such concurrence, then by the chief judge.
- (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.
- (3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.
- (4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the

district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

- (5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.
- (6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.
- (7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take a verbatim record by shorthand or by mechanical means, or by an employee of the court designated by the court to take such a verbatim record. Notwithstanding the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests, (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court.

APPENDIX B

18 U.S.C. § 3401(a), (f), (g) and (h) (1979).

(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

(b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of a district court. . . .

(f) The district court may order that proceedings in any misdemeanor case be conducted before a district judge rather than a United States magistrate upon the court's own motion or, for good cause shown, upon petition by the attorney for the Government. Such petition should note the novelty, importance, or complexity of the case, or other pertinent factors, and be filed in accordance with regulations promulgated by the Attorney General.

(g) The magistrate may, in a case involving a youth offender in which consent to trial before a magistrate has been filed under subsection (b) of this section, impose sentence and exercise the other powers granted to the district court under chapter 402 and section 4216 of this title, except that—

- (1) the magistrate may not sentence the youth offender to the custody of the Attorney General pursuant to such chapter for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense;
- (2) such youth offender shall be released conditionally under supervision no later than 3 months before the expiration of the term imposed by the magistrate, and shall be discharged unconditionally on or before the expiration of the maximum sentence imposed; and
- (3) the magistrate may not suspend the imposition of sentence and place the youth offender on probation for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense.

(h) The magistrate may, in a petty offense case involving a juvenile in which consent to trial before a magistrate has been filed under subsection (b) of this section, exercise all powers granted to the district court under chapter 403 of this title. For purposes of this subsection,

proceedings under chapter 403 of this title may be instituted against a juvenile by a violation notice or complaint, except that no such case may proceed unless the certification referred to in section 5032 of this title has been filed in open court at the arraignment. No term of imprisonment shall be imposed by the magistrate in any such case.